



OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

August 8, 2002

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2002-4365

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166847.

The Texas Department of Human Services (the "department") received a request for "the statement of deficiencies from an investigation done on the health agency: Select Health Care Services." You state that you will provide some responsive information to the requestor. You also state that the department will withhold some responsive information from disclosure pursuant to Open Records Letter No. 2001-5348 (2001). You claim, however, that portions of the remaining requested information are excepted from disclosure pursuant to section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Initially, we note, and you acknowledge, that the department did not comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office regarding the requested information. Section 552.301 provides that a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code § 552.301(b)*. You state that the department received the written request for information on May 15, 2002. Therefore, the department had until May 30, 2002 to request a decision from our office regarding the requested information. However, the department did not request a decision concerning the

requested information until June 3, 2001, more than ten business days after the date that the department received the request. Accordingly, we conclude that the department failed to comply with the procedural requirements of section 552.301. *See* Gov't Code § 552.301(b).

Because the department failed to request a decision within ten business days of receiving the request, the information at issue is presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The department must demonstrate a compelling interest to withhold the information in order to overcome this presumption. *See id.* Normally, a governmental body demonstrates a compelling interest by showing that some other source of law makes the information confidential or that the release of the requested information implicates third party interests. *See* Open Records Decision No. 150 at 2 (1977). Since the department claims that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.101 and 552.136 of the Government Code, we address your claims.

You claim that portions of Attachment B are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code.¹ Section 142.009(d) provides:

The reports, records, and working papers used or developed in an investigation made under [Chapter 142] are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule;
- (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency;

¹Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

(6) on a form required by a federal agency if:

(A) the information does not reveal the identity of an individual, including a patient or a physician or other medical practitioner;

(B) the service provider subject to the investigation had a reasonable opportunity to review the information and offer comments to be included with the information released or made public; and

(C) the release of the information complies with any other federal requirement; or

(7) as provided by Section 142.0092.

Health & Safety Code § 142.009(d). You acknowledge that section 142.009(d)(5) requires the department to release the state forms in Attachment B. However, you contend that the department must withhold the identifying information of individuals contained within each form from disclosure pursuant to section 142.009(d)(5). Based on your representations and our review of Attachment B, we conclude that the department must withhold from disclosure the identifying information of the individuals highlighted in the state forms pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code.

You also claim that portions of Attachment B are subject to the Medical Practice Act, (the "MPA"), subtitle B of Title 3 of the Occupations Code. Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002. We note that the MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. *See Open Records Decision No. 598 (1991)*. Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records.

See Occ. Code § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). Based on our review of your arguments and Attachment B, we conclude that the information that we have marked may only be disclosed in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, the department must withhold this information from disclosure pursuant to the MPA.

In summary, the department must withhold the identifying information of the individuals highlighted in the state forms in Attachment B from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. Absent the applicability of an MPA access provision, the department must withhold from disclosure the information in Attachment B that we have marked pursuant to the MPA. The department must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 166847

Enc. Submitted documents

c: Ms. Martha Cuthbert
7111 Zieglers Grove
Richmond, Texas 77469
(w/o enclosures)